

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE CITY OF BLAINE, *et al.*,

Plaintiffs,

v.

GOLDER ASSOCIATES, INC., *et al.*,

Defendants.

No. C03-0813L

ORDER AWARDING ATTORNEY'S
FEES AND COSTS

I. INTRODUCTION

This matter comes before the Court on "Plaintiffs' Motion for Attorneys' Fees" (Dkt. #457). Plaintiffs assert a claim for fees and costs in the amount of \$1,320,394.73 under RCW 4.84.330 and contractual fee-shifting provisions. *Id.* at 8-9. Defendants oppose this claim in its entirety on two grounds: (1) plaintiffs were not the substantially prevailing party under the contractual fee-shifting provision; and (2) the contract's indemnity clause did not expressly allow for recovery of attorney's fees incurred in establishing the right to indemnification. Although defendants do not contest the reasonableness of the hourly rates charged by the plaintiffs' lawyers and legal support staff, defendants do contest the reasonableness of the 6,504.1 hours given the theories and parties that have been dismissed in this litigation and the results at trial. The Court held a hearing on the motion on October 16, 2006 and heard oral argument from counsel for plaintiffs and defendants.

ORDER AWARDING
ATTORNEY'S FEES AND COSTS

For the reasons set forth below, plaintiffs' motion for attorney's fees is granted in part.¹

II. DISCUSSION

A. Background

When this action was removed to federal court on April 8, 2003, plaintiffs asserted claims against five defendants based on seven causes of action: (1) breach of contract; (2) statutory trespass; (3) common-law trespass; (4) civil RICO; (5) indemnity; (6) negligence; and (7) negligent supervision. See Dkt. #1. Plaintiffs also included an alter ego theory of relief in the causes of action for indemnity and breach of contract. See, e.g., Dkt. #98 at ¶¶ 4.1.4, 4.1.5, 4.4.3, 4.4.4.

Ultimately, the liability and damages phase of the trial went to the jury on two causes of action, breach of contract and indemnity, against a single defendant Golder Associates, Inc. ("GAI").² The jury awarded plaintiffs \$91,025 for their breach of contract claim, and \$1,040,000 for their indemnity after a reduction of 35% for comparative fault. See Dkt. #449 (Verdict Form). Before trial, plaintiffs were seeking \$34,936,996.88 for breach of contract damages and over \$1.7 million on their indemnity claim. See Dkt. #412; #455 at 2. On plaintiffs' indemnity claim, the issue of damages was largely uncontested. See Dkt. #455 at 4-5.

B. Analysis

In this case, the Court has jurisdiction based on the parties' diversity of citizenship. In a diversity action, a motion for attorney's fees and costs is reviewed under the governing state law. See Michael-Regan Co., Inc. v. Lindell, 527 F.2d 653, 656 (9th Cir. 1975) ("Federal courts

¹ Although plaintiffs' motion for attorney's fees and costs is technically premature since final judgment has not been entered, the Court considers it at this time in the interest of judicial economy. See RCW 4.84.330 (requiring a "final judgment").

² Phase II of the trial, which has not yet occurred, involves the alter ego remedy theory against defendants Golder Associates Corporation, Enterra Holdings, Ltd. and GAI.

1 are required to apply state law in diversity action with respect to the allowance or disallowance
 2 of attorney fees.”). This case is governed by Washington law. See Dkt. #480 at 41, ¶G
 3 (Applicable Law).

4 In Washington, the “lodestar” method is the starting point for fee calculations. The
 5 lodestar fee is determined by multiplying the hours reasonably expended in the litigation by each
 6 lawyer’s reasonable hourly rate of compensation. Bowers v. Transamerica Title Ins. Co., 100
 7 Wn.2d 581, 597 (1983). The burden of demonstrating that a fee is reasonable is on the fee
 8 applicant, who must provide documentation sufficient to “inform the court, in addition to the
 9 number of hours worked, of the type of work performed and the category of attorney who
 10 performed the work (*i.e.*, senior partner, associate, etc.).” Bowers, 100 Wn.2d at 597; see also
 11 Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 151 (1993).

12 In evaluating the reasonableness of a fee award, the Court may consider the relationship
 13 between the amount in dispute and the fee requested and the hourly rate of opposing counsel.
 14 Fetzer, 122 Wn.2d at 150; Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 66 (1987). The court
 15 should also “discount hours spent on unsuccessful claims, duplicated effort, or otherwise
 16 unproductive time.” Bowers, 100 Wn.2d at 597. Although the reasonableness of a request
 17 depends on the circumstances of each individual case,

18 [t]he determination of a fee award should not become an unduly burdensome proceeding
 19 for the court or for the parties. An explicit hour-by-hour analysis of each lawyer’s time
 20 sheets is unnecessary as long as the award is made with a consideration of the relevant
 21 factors and reasons sufficient for review are given for the amount awarded. An award of
 22 substantially less than the amount requested should indicate at least approximately how
 23 the court arrived at the final numbers and explain why discounts were applied.

24 Absher Constr. Co. v. Kent Sch. Dist., 79 Wn. App. 841, 848 (1995) (internal citation and
 25 quotation marks omitted); see also Schmidt v. Cornerstone Invs., Inc., 115 Wn.2d 148, 169
 26 (1990) (“Whether attorney fees are reasonable is a question of fact to be answered in light of the
 particular circumstances of each individual case, and in fixing fees the trial court is given broad
 discretion.”).

1 **1. Right to fees and costs under the contract**

2 As a threshold matter, defendants argue in their response that plaintiffs' motion for fees
3 should be denied in its entirety for two reasons: (1) plaintiffs were not the "substantially
4 prevailing party" as required in the contract fee-shifting provision; and (2) the contract's
5 indemnity provision did not expressly allow for the recovery of attorney's fees incurred in
6 establishing the right to indemnification. These arguments are addressed, in turn, below.

7 **A. Substantially prevailing party provision**

8 The professional service agreement between plaintiff City of Blaine and defendant GAI
9 contains the following attorney's fees provision: "Attorney Fees. The substantially prevailing
10 party in any litigation arising hereunder shall be entitled to its reasonable attorney's fees and
11 court costs, including appeals, if any." See Dkt. #480 at 41, ¶H (admitted trial exhibit #53).
12 This provision is construed under Washington law. See Michael-Regan Co., 527 F.2d at 656.
13 Revised Code of Washington § 4.84.330 states, in part:

14 In any action on a contract or lease entered into after September 21, 1977, where such
15 contract or lease specifically provides that attorney's fees and costs, which are incurred to
16 enforce the provisions of such contract or lease, shall be awarded to one of the parties,
17 the prevailing party, whether he is the party specified in the contract or lease or not, shall
be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.
. . . As used in this section "prevailing party" means the party in whose favor final
judgment is rendered.

18 Although RCW 4.84.330 refers to the "prevailing party," under the contract in this case, fees are
19 to be awarded to the "substantially prevailing party," and defendants argue that plaintiffs are not
20 the "substantially prevailing party." See Response at 4-6.

21 In Washington, determining the "substantially prevailing party . . . depends upon the
22 extent of relief afforded the parties." Riss v. Angel, 131 Wn.2d 612, 633 (1997). Here,
23 plaintiffs obtained a jury verdict for over \$1,000,000 in net damages on all of the claims
24 presented to the jury. See Dkt. #449. In contrast, all of defendants' counterclaims were
25 dismissed before trial and they obtained no monetary relief. See Dkt. #129 (Counterclaims);
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1 Dkt. #221 (Order Granting Motion to Dismiss Counterclaims). Based on the “extent of relief”
 2 standard, plaintiffs are the “substantially prevailing party” under the contract and entitled to
 3 recover reasonable attorney’s fees and costs.

4 It is true that defendants successfully defended five causes of action. See Dkt.#25 (Order
 5 dismissing civil RICO claim); Dkt. #144 (Order dismissing plaintiffs’ negligence claims); Dkt.
 6 #260 (Order dismissing plaintiffs’ trespass claims). However, the “proportionality approach”
 7 defendants advocate to determine the substantially prevailing party is not appropriate here for
 8 three reasons. See Response at 6 (citing Marassi v. Lau, 71 Wn. App. 912, 916 (1993)); Reply
 9 at 3. First, this is not a case where “the contract breaches at issue consist of several distinct and
 10 severable claims.” See Marassi v. Lau, 71 Wn. App. at 917. The five causes of action that were
 11 dismissed arose under the same set of facts as the two causes of action that went to trial. See
 12 Dkt. #2 (First Amended Complaint); Dkt. #98 (Second Amended Complaint). Second, had the
 13 parties intended to apply the proportionality approach from Marassi v. Lau, 71 Wn. App. 912
 14 (1993) to determine the prevailing party for purposes of an attorney’s fee award, they could have
 15 incorporated it into their 1998 agreement. But, they did not. Instead, the parties expressly
 16 included a “substantially prevailing party” standard, the meaning of which is defined by the
 17 Washington Supreme Court in Riss v. Angel, 131 Wn.2d 612, 633 (1997). Finally, in their
 18 response, defendants did not provide a declaration with the fees they incurred in defending the
 19 dismissed causes of action which would be necessary for the Court to apply the “proportionality
 20 approach.” For these reasons, the Court declines to apply a proportionality approach in this
 21 case. Plaintiffs are entitled to an award of attorney’s fees and costs as the “substantially
 22 prevailing party” based on the extent of relief they obtained at trial.

23 **B. Indemnity provision**

24 Defendants also allege that plaintiffs are not entitled to attorney’s fees on their indemnity
 25 claim because the indemnity provision does not expressly contain a provision allowing for the
 26

1 recovery of attorney's fees incurred in establishing the right to indemnification. See Response at

2 6. The indemnity provision states, in relevant part:

3 Golder agrees to defend, indemnify and save harmless the City, its appointed and elected
4 officers and employees, from and against any and all liability, loss, costs, damage and
5 expense, including costs and attorney fees in defense thereof because of actions, claims
6 or lawsuits for damages alleged to have been sustained by any person or persons and
7 account of damage to property, arising out of the performance of this Agreement to the
8 extent due to the negligence of Golder, its subcontractors, agents, successors or assigns.
9 This provision shall not be inapplicable to the extent the City is judicially found solely
10 negligent for such damage or injury.

11 See Dkt. #480 at 40, ¶6 (admitted trial exhibit #53).

12 Defendants, citing a phrase from Tri-M Erectors, Inc. v. Donald M. Drake Co., 27 Wn.
13 App. 529, 538 (1980), argue that "an indemnitee may not recover legal fees incurred in
14 establishing his right to indemnification." Defendants, however, fail to provide the full language
15 of this quote, which states: "We hold, therefore, that, in the absence of express contractual
16 terms to the contrary, an indemnitee may not recover legal fees incurred in establishing his right
17 to indemnification." Tri-M Erectors, Inc., 27 Wn. App. at 538 (citing Jones v. Strom Constr.
18 Co., 84 Wn.2d 518, 523 (1974) (emphasis added).

19 In this case, there is express language allowing for the recovery of fees incurred in
20 establishing the right to indemnity. The contract provides for the recovery of fees "in any
21 litigation arising hereunder [the Agreement]." See Dkt. #480 at 41, ¶H. The right to indemnity
22 arises out of defendant GAI's and the City of Blaine's contract for professional services. See
23 Dkt. #447 (Jury Instructions Nos. 11 and 16). Therefore, plaintiffs are entitled to fees on their
24 indemnity claim.

25 Having determined that plaintiffs are entitled to fees under the contract, the Court must
26 next determine both the reasonableness of plaintiffs' hourly rates and the hours expended.

2. Reasonableness of hourly rates

A lodestar analysis requires that the court determine the reasonableness of the hourly fee
requested. See Bowers, 100 Wn.2d at 597. Plaintiffs have asserted a total claim for fees and

costs in the amount of \$1,320,394.73. See Motion at 8-9. This figure is composed of 4 parts: (1) “market rate” fees for Northcraft, Bigby & Biggs, P.C. (“Northcraft”) of \$1,027,576.50; (2) “market rate” fees for Chmelik Sitkin & Davis, P.S. of \$109,208.00 (“Chemlik”); (3) costs incurred by Northcraft of \$175,820.05; and (4) costs incurred by Chmelik of \$7,790.18 Id.

In their motion, plaintiffs argue that they are entitled to recover “market rates” in excess of the rates billed by their counsel. See Motion at 6-9. During litigation, Northcraft billed its partners at a rate \$140 and \$145 per hour and Chmelik’s rates were between \$150 and \$180 per hour. See id. at 7-8. Plaintiffs seek an award based on “market rates” of between \$150 - \$200 for Northcraft attorneys and between \$150 - \$245 for Chmelick attorneys. See id. at 8-9.

In this case, however, an attorney fee enhancement based on “market rates” is not appropriate because this is a dispute between private parties not impacting a right concerning the public interest.³ See Fisher Properties, Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 378 (1990) (holding that “[w]e will not extend fee enhancement beyond civil rights litigation” and stating “[l]itigation between private parties, seeking to enforce no important right affecting the public interest, is not the appropriate forum for attorney fee enhancement”).⁴ Defendants have not contested the reasonableness of plaintiffs’ hourly rates and an established billing rate is generally deemed to be reasonable. See Bowers, 100 Wn.2d at 597 (“Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate.”). The Court finds that the rates plaintiffs actually billed their clients is reasonable. Therefore, the

³ Although plaintiff City of Blaine is technically not a “private party,” it is in the position of a private party in the context of this litigation and for purposes of an attorney fee enhancement review.

⁴ The published cases plaintiffs cite to support an enhanced fee award involve civil rights litigation or the public interest context. See Motion at 6-7; Blum v. Stenson, 465 U.S. 886 (1984) (arising under the Civil Rights Attorney’s Fees Act, 42 U.S.C. § 1988); Depart. of Labor & Indus. v. Overnite Transp. Co., 67 Wn. App. 24 (1992) (arising under RCW chapters 42.52; 46.09; 48.03 and citing Blum, 465 U.S. at 886); Martinez v. City of Tacoma, 81 Wn. App. 228 (1996) (arising under RCW 49.60).

only remaining inquiry is the number of hours plaintiffs' counsel reasonably expended in the litigation. See Bowers, 100 Wn.2d at 597.

3. Number of hours reasonably expended

Northcraft billed and has been paid \$788,812 in fees based on 5,993.7 hours at the billed hourly rate. See Motion at 8. Chemlik billed and has been paid \$82,661.50 in fees based on 510.4 hours at the billed hourly rate. Id. Under the lodestar analysis, the court should "discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time." Bowers, 100 Wn.2d at 597. Here, given the number of dismissed causes of action and parties, unsuccessful theories and motions, duplicated effort, and the amount of the jury award versus the amount claimed, discounting hours is appropriate. The parties themselves concede that discounting is appropriate. See Reply at 6; Response at 7-8 ("[H]ours should be discounted related to briefing on the causes of action that were dismissed."). As a result, the Court finds the hours and amounts spent on the following tasks should be discounted from the billed amounts claimed and in plaintiffs' motion.

(1) April 2004 motions to compel.

Both plaintiffs and defendants agree that the \$1,918.17 in fees awarded to plaintiff on their motions to compel should be removed from plaintiffs' fee submission. See Dkt. #43, #47, #51 and #79; Response at 9; Reply at 6 ("Therefore, that time should not be considered."). Accordingly, the Court discounts **\$1,918.17** from the fee award calculation for fees already paid by defendant. See Dkt. #79; Dkt. #458 at 213.

(2) Dismissed claims and defendants.

Before trial, five out of seven of plaintiffs' causes of action were dismissed. See Dkt. #25 (Order dismissing civil RICO claim); Dkt. #144 (Order dismissing plaintiffs' negligence claims); Dkt. #260 (Order dismissing plaintiffs' trespass claims). Three of the six defendants have been dismissed from this case. See id.; Dkt. #264 (dismissing breach of contract claims against

1 Gordon Tucker, Jane Doe Tucker, and Golder Associates, Ltd.).

2 In their motion, plaintiffs have not provided the Court with a breakdown of fees by claim
 3 and defendant. Plaintiffs have not met their burden to show that their fee application is
 4 reasonable because they have not provided sufficient evidence to show how the hours spent
 5 litigating unsuccessful claims against ultimately dismissed parties are reasonable in this case, or,
 6 what portion of the fees submitted relate to these claims and parties. Under Yousoufian v.
 7 Office of Ron Sims, 114 Wn. App. 836, 856 (2004), rev'd on other grounds, 152 Wn.2d 421
 8 (2004), a court may reduce a fee application by a percentage factor for a "variety of other
 9 considerations including, the lack of clarity in counsel's presentation to the court." Given the
 10 five dismissed causes of action and three dismissed parties, coupled with the lack of clarity in
 11 counsel's fee presentation, the Court finds that a discount of 20% of plaintiffs' fees is reasonable
 12 in this case. See id. at 856 (reducing plaintiff's fee by 20%). This translates to a reduction of
 13 **\$174,294.70** (20% of the \$871,473.50 fees billed) from plaintiffs' fee application. See Motion
 14 at 8.

15 (3) Unsuccessful motions and theories.

16 During the course of litigation, plaintiffs filed numerous motions advancing unsuccessful
 17 theories. As a representative sample, on September 1, 2004, plaintiffs noticed the deposition of
 18 defense counsel Michael Bond. Soon thereafter on October 20, 2004, the Court granted
 19 defendants' motion to quash Mr. Bond's deposition. See Dkt. #141. Undeterred by the Court's
 20 decision, on October 29, 2004, plaintiffs filed a motion for clarification of the Court's order.
 21 See Dkt. #145. The Court denied this motion. See Dkt. #154. Also during the discovery phase,
 22 on May 26, 2005 the Court denied plaintiffs' "motion for the taking of depositions" and granted
 23 defendants' motion to quash the subpoena to the records custodian of the Register of
 24 Professional Archeologists. See Dkt. #278. Plaintiffs also advanced unsuccessful damage
 25 theories. See, e.g., Dkt. #262 (Order Granting Defendants' Motion for Partial Summary
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1 Judgment Regarding Pre-July 1, 1999 Conduct). Hours were also incurred on unnecessary
2 activities like perpetuating the testimony of Grant Stewart and Anthony Mortillaro in Santa Fe,
3 New Mexico. See Reply at 2. These witnesses were available and testified at trial.

4 Plaintiffs have not met their burden to show how many of the hours billed were spent on
5 unsuccessful motions and theories. The Court finds a discount factor of 10% on the fees billed
6 is appropriate because of the lack of clarity in plaintiffs' fee application showing the hours
7 expended on these activities. See Yousoufian, 114 Wn. App. At 856. This translates to a
8 reduction of **\$87,147.35** (10% of the \$871,473.50 fees billed) from plaintiffs' fee application.
9 See Motion at 8.

10 (4) Fee disproportionate to results.

11 As discussed above, the Court has discounted hours based on dismissed claims and
12 parties and unsuccessful theories and motions. In Washington, a fee award may be reduced
13 where it is disproportionate to the results at trial. See, e.g., Singleton v. Frost, 108 Wn.2d 723,
14 731 (1987). Here, plaintiffs' net award at trial for both the indemnity and breach of contract
15 claims is \$1,131,025. See Dkt. #449 (awarding \$91,025 for breach of contract damages and
16 65% of \$1.6 million for indemnity). The Court finds that plaintiffs' attorney's fees are
17 disproportionate to the results obtained. First, the amount of fees billed by plaintiffs in this case,
18 \$871,473.50, is almost equal to the jury award. Second, plaintiffs claimed \$34,936,996.88 in
19 breach of contract damages before trial, but the jury returned a verdict for only \$91,025. See
20 Dkt. #449; Dkt. #412 (Plaintiffs' Amended Proposed Pretrial Order). Although the jury awarded
21 nearly all of the \$1,617,352.92 allegedly paid by plaintiff St. Paul on the indemnity claim before
22 the application of comparative fault, as plaintiffs concede, these damages were largely
23 undisputed. See Dkt. #455 at 4-5. Therefore, the Court finds a 10% discount factor is
24 appropriate in order to balance the fees with the results obtained in this case. This translates to
25 an additional reduction of **\$87,147.35** (10% of the \$871,473.50 fees billed) from plaintiffs' fee
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1 application. See Motion at 8.

2 **4. Costs**

3 Plaintiffs also claim a total of \$183,610.23 in costs. See Motion at 9. The costs incurred
4 are related to the activities discussed above and the Court finds the same discounting factors
5 should apply. Therefore, a reduction of 40% is applied to reduce the costs incurred for
6 dismissed parties, claims, unsuccessful motions and theories, and disproportionate costs incurred
7 to results obtained. This translates to a reduction in costs of **\$73,444.09**.

8 **III. CONCLUSION**

9 For all of the foregoing reasons, plaintiffs' "Motion for Attorneys' Fees" (Dkt. #457) is
10 GRANTED IN PART. Plaintiffs are awarded attorney's fees in the amount of **\$520,965.93** and
11 costs of **\$110,166.14** for substantially prevailing against defendants.

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13 DATED this 18th day of October, 2006.

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16 Robert S. Lasnik
17 United States District Judge
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